86-898

Supreme Court, U.S.
FILED
SEP 12 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE DUNBAR PREWITT, JR.,

Petitioner,

vs.

UNITED STATES POSTAL SERVICES,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To the United States Court of Appeals
For The Fifth Circuit

GEORGE D. PREWITT, JR.
Pro Se
P.O. Box 1728
Oxford, MS 38655
(601) 234-3562

KEVIN RACHEL, ESQ.
475 L'Enfant Plaza
Washington, D.C. 20260

QUESTIONS PRESENTED

I

Whether backpay can be waived when it is specifically requested in the complaint and the other party is not prejudiced by laches or other reasons.

II

Whether a complainant is entitled to interest on backpay award against the U.S. Postal Service, in view of the split among the circuits on this issue, since interest appears to mandated on such awards against the postal service by Article I, section 8, the doctrine of Separation of Powers, and 39 U.S.C. §401 (1), and 28 U.S.C. §1961.

III

Whether the First Amendment is violated when costs, previously awarded, are denied along with retroactive sick and annual leave of speech used by complainant.

IV

Whether a hearing to determine backpay is necessary and whether the employer must rebut the presumption of backpay by clear and convincing evidence instead of preponderance or reasonable evidence, since a hearing on affidavits constitute hearsay, is imprecise, and does not serve the twin goals of Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED . . .	i, ii
TABLE OF AUTHORITIES . .	viii, ix
OPINION OF THE COURT BELOW .	2
JURISDICTIONAL STATEMENT . .	2
CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES .	3
STATEMENT OF THE CASE . .	3
REASONS FOR GRANTING THE WRIT .	9
ARGUMENT NO. I:	
Backpay cannot be waived where the other party is not prejudiced because of the presumption for such backpay created by Albemarle Paper Co. v. Moody, 422 U.S. 405	

(1975), and because of the explicit command regarding relief in F.R. Civ. P. 54(c) . . . 9

ARGUMENT NO. II:

A complainant is entitled to a hearing to establish the amount of backpay to which he is entitled, at which time he can offer evidence as to why he was forced to reject a job substantially different from the one offered, why that substantially different job cannot be used to toll backpay, and the employer must rebut this proof of entitlement to backpay with clear and convincing evidence.

Determining backpay by affidavit is to allow hearsay evidence to control 12, 13

ARGUMENT NO. III:

In view of the split among the circuits on whether interest can be awarded on backpay awards against the postal service, and since the Congress, given the power to establish post offices and post roads in the Constitution, has given the postal service the right to sue and be sued in 39 U.S.C. 401 (1), interest should be allowed against the postal service . . . 24, 25

ARGUMENT NO. IV:

Costs, retroactive sick and annual leave, along with other benefits, cannot be denied a pro se litigant simply because he exercises his First Amendment right to say that some members of the judiciary and the staffs therein are racist in their dispositions . . 35

CONCLUSION 42

CERTIFICATE OF SERVICE . . 43

APPENDIX:

APPENDIX "A" - Opinion of the Court of Appeals (Fifth Circuit). A1

APPENDIX "B" District Court Opinion. . A16

APPENDIX "C" - District Court Opinion . . A23

APPENDIX "D" Affidavit of Postmaster . A30

APPENDIX "E" Sanction Sheet A32

APPENDIX "F" Relevant postal service regulations A33

APPENDIX "G" Constitutional and Statutory provisions . A41

TABLE OF AUTHORITIES

	PAGES
Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) . .	9
Cross v. United States Postal Service, 733 F.2d 1327 (8th Cir. 1985) . .	31
Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) . .	16
Franchise Tax Board v. United States Postal Service, 104 S. Ct. 2549 (1984) .	30
Gele v. Wilson, 616 F.2d 146 (5th Cir. 1980) . .	29
Hall v. Bolger, 768 F.2d 1148 (9th Cir. 1985). . .	31
Library of Congress v. Shaw, 106 S. Ct. 2959 (1986) . .	30
Nagy v. United States Postal Service, 773 F.2d 1190, (11th Cir. 1985) . .	31
Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, (5th Cir. 1974)	32

Prewitt v. United States Postal Service, 662 F.2d 211, (5th Cir. 1981) . . . 4

Prewitt v. United States Postal Service, 662 F.2d 311, (5th Cir. 1981) . . . 4

R & R Farm Enterprise, Inc. v. Federal Crop Insurance Corporation, Department of Agriculture, 788 F.2d 1148, (5th Cir. 1986) . . 26

Reeves v. International Telephone & Telegraph Corporation, 705 F.2d 750 (5th Cir. 1983) . 28

CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8 . . .

39 U.S.C. § 401(1) . . .

29 U.S.C. § 794(a) . . .

28 U.S.C. § 1961 . . .

NO.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

GEORGE DUNBAR PREWITT, JR.,

Petitioner,

vs.

UNITED STATES POSTAL SERVICE,

Respondent.

PETITION FOR WRIT OF CERTIORARI
To The United States Court of Appeals
For The Fifth Circuit

To The Honorable, The Chief Justice And Associate Justices Of the Supreme Court Of The United States:

The Petitioner, George Dunbar Prewitt, Jr., respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, which judgment became final on June 17, 1986.

OPINION BELOW

The Opinion of the Court of Appeals (Appendix "A", infra, pp. A1-A6) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 17, 1986, and an appeal sent, via United States Mail (Express) on September 12, 1986, to this court for a Writ of Certiorari. That express mail was inadvertently broken open by the postal service with part of the package coming back to me and the other part being sent back by the clerk for failure to comply with printing requirements. Being a pro se litigant, I haven't much knowledge of these matters. I attached copies of the returned mail and the receipt for the express mail package and hope that this court will not judge this revised

package to be untimely. The jurisdiction of this court is invoked under 28 U.S.C. 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS WHICH THE CASE INVOLVES

The relevant constitutional and statutory provisions are set forth in the appendix, and are Article I, § 8, 28 U.S.C. § 1961, 29 U.S.C. § 794(a), 39 U.S.C. § 401(1), and F.R. Civ. P.54(c).

STATEMENT OF THE CASE

In June of 1978, I applied for, by taking the clerk/carrier examination and filling out the requisite papers, a position with the postal service. On February 2, 1979, I was formally rejected because of my handicap which was sustained as the result of a gunshot wound in Vietnam. In 1980, I applied for the position of substitute rural carrier, and was again rejected, in

February of 1981, because of my handicap.

Subsequently, I filed actions based on both rejections, and the district court threw out both actions, citing both as frivolous. The Court of Appeals for the Fifth Circuit then issued, on appeal, two decisions overturning the district court. These two opinions by the Fifth Circuit are found at 662 F.2d 292 and 662 F.2d 311, respectively, styled as Prewitt v. United States Postal Service, hereinafter cited as Prewitt I and II.

On remand, I asked two judges to recuse themselves, owing to one's failure to have even one black grand jury foreman during his tenure on the bench and his authorship of a book that advocated substantial changes in the Voting Rights Act of 1965. The second judge had encountered stiff opposition

from black people during his confirmation hearings before the U.S. Senate, with some stating that while L.T. Senter, Jr. was a state judge, he had called black people "niggers".

I then sought Judge Senter's side of these shocking charges in a motion of the court, and in subsequent motions. Judge Senter refused to hold a preliminary injunction hearing, for which he was once more reversed by the Fifth Circuit in an unpublished opinion. After holding a hearing, at which it was held that discrimination had indeed taken place against me by the postal service, Judge Senter recused himself, refusing to rule upon my charges of violation of the Veterans Preference Act of 1944 and the extent of my damages.

The next judge then decided the entire backpay matter on the basis of

the record and never held a hearing. He allowed me no discovery, which in the absence of a hearing, put me at a decided disadvantage because the postal service had control of all the records. The judge awarded me backpay and costs through February 19, 1983, but no interest against the postal service because of sovereign immunity. Subsequently, on appeal, I sought interest, backpay through February 2, 1985, for the postal service had hired me on February 19, 1983, but at a starting salary, and I wanted the difference in backpay between what I actually received and what I was entitled to, absent the discrimination which would have seen me hired in 1978 or 1979, from 1983 until I was fully promoted on February 2, 1985.

The Fifth Circuit did not address the backpay or interest issue raised by me, but did allow the postal service claims, and ordered the district court to make new findings and to subtract the amount of money I would have earned had I accepted the substitute rural carrier's job in April of 1982. I could not accept the job since I had moved away in search of work and was unable, financially, to move back.

The district court again conducted no hearings but allowed the postal service and me to supplement the record by affidavit, which method again put me at a disadvantage and which allowed in hearsay to which I objected because I had no opportunity to subpoena and cross-examine witnesses and records, and I was denied discovery once more. The district court subtracted $28,000 from

my original award based solely upon the record and the postal service's submissions, denied interest on the award because it was of the opinion that the Fifth Circuit had affirmed sub silentio its earlier denial of interest, ruled that I had waived backpay from 1983-1985, and denied me costs, thus rescinding its earlier award of costs.

On appeal of the deduction of $28,000, the denial of backpay from 1983-1985 and costs, and interest, the Fifth Circuit then sanctioned me for appealing these issues, saying that backpay had been waived, along with interest and costs. The Fifth Circuit also denied me sick leave, annual leave, and fringe benefits as part of the backpay award. The Fifth Circuit allowed the postal service double costs as a sanction against me, and openly

criticized me for my use of what it termed "rancorous" language. That language consisted of saying that white people are more inclined to listen to other white people than to black people. I submit that the language for which I was punished is essentially correct, and that my First Amendment rights were violated when I was punished for speaking out.

REASONS FOR GRANTING THE WRIT

ARGUMENT NO. I

Backpay Cannot Be Waived Where The Other Party Is Not Prejudiced Because Of The Presumption For Backpay Created By Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

There is a strong presumption in favor of backpay, with respect to

victims of discrimination in employment. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975). Thus, the district court's stated grounds for denying backpay from 1983 through February 2, 1985, (See Appendix C) must be measured against the twin reasons expressed in Albemarle of (1) making persons whole for injuries suffered from past discrimination, and (2) eradicating discrimination throughout the economy. I submit that simply because I failed to express the precise period for which I sought backpay is not a sufficient reason for denial of backpay, especially in light of the fact that the entire issue of backpay was decided without a hearing at which I could have aided the court in the determination of the commencement and cessation of the backpay period by the examination of witnesses from the

postal service. The record is clear that I sought backpay in my complaint, insisted upon it throughout subsequent appeals to the point where I was sanctioned by the Fifth Circuit, & tried at all times to bring this oversight by the court to the attention of the court. There is no evidence of any waiver within the meaning of Albemarle, and I ask for the writ to issue the Fifth Circuit.

Moreover, F.R. Civ. P. 54(c) states that..., "every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings." This rule, by itself, seems to mandate the relief to which I was entitled on the merits, even absent a specific prayer for such relief. However, I made such a demand

BEST AVAILA

for backpay in my complaint and throughout this action. Therefore, I am of the opinion that Albemarle and Rule 54(c) requires that the judgments of the courts below be overturned, and that new hearings be held to determine backpay.

ARGUMENT NO. II

A Complainant Is Entitled To A Hearing To Establish The Amount Of Backpay To Which He Is Entitled, At Which Time He Can Offer Evidence As To Why He Was Forced To Reject A Job Substantially Different From The One Offered, Why That Substantially Different Job Cannot Be Used To Toll Backpay, And The Employer Must Rebut This Proof Of Entitlement

BLE COPY

To Backpay With Clear And Convincing Evidence. Determining Backpay By Affidavit Is To Allow Hearsay Evidence To Control.

Realizing that great weight is given to findings of an appellate court and a district court, I wish to point out that neither the district nor the appellate court required the clear and convincing standard of proof that is applicable once liability has been shown and the employer, having been shown to be guilty of discrimination, is attempting to limit is backpay liability. The district court accepted, without a hearing on the basis of affidavits which amounted to hearsay, and without allowing this pro se litigant discovery, any evidence proffered by the postal

service. In doing so, the district court committed two errors.

First, it chose the wrong person by which my backpay was to be reduced, and second, it reduced my backpay by the amount of a job, involuntarily refused because of my having moved away and financial inability to purchase a car which was a requirement of the job, that was substantially different in pay, working conditions, and fringe benefits from the job I originally applied for and which I promptly accepted, even absent backpay and retroactive seniority once it was offered a year later. In the affidavit by the postmaster at the facility at which I am now employed, it is asserted that every substitute rural carrier is assigned to a different carrier. (See "Second Supplemental Affidavit of Vance O. Lipe" attached to

this petition as Appendix D). That being the case, I could not have worked as a substitute rural carrier in 1981, as did the person whose wages the district court used to reduce my pay, since the order overturning the refusal of the postal service to hire me only came in February of 1982, and the offer from the postal service of the job came only in April of 1982. Thus, my wages should have been reduced by a person who began work in 1982, when I would have begun work had I been able to accept the position. In 1982, I would have worked for a different carrier than if I had started in 1981 according to the affidavit of Vance O. Lipe, and thus my earnings would have been different, and the amount reducing my backpay different.

However, that reduction of my backpay, without a hearing, without discovery, and without application of the clear and convincing standard of proof once discrimination had been shown and the guilty party was attempting to rebut the presumption of backpay outlined in Albemarle, went beyond Ford Motor Co. v. EEOC, 458 U.S. 219 (1982) and held that a job substantially different in pay, working conditions, and benefits could be used to toll backpay even if the original job was accepted as soon as it was offered. As noted in my Statement of the Case, I applied for two positions with the postal service, with one being a clerk/carrier and the other being a substitute rural carrier position. I was rejected for the substitute rural carrier position in 1981 by the postal service, and that decision was

overturned, and the postal service ordered to offer me a position in 1982.

In 1982, I had moved to another city in search of a job, and I could not move back to accept the job, and I could not afford to purchase an automobile which was a prerequisite of the job. For those reasons, I was forced to involuntarily reject a job that I sorely wanted and needed.

Even so, the job was substantially different from the clerk/carrier for which I had originally been rejected in 1982. For instance, section 323.212 of the postal service's Employee and Labor Relations Manual (copy attached as Appendix F-1) excludes substitute rural carriers from its definition of career appointments. This means that a substitute rural carrier is not covered by civil service protection, civil

service retirement programs, and can be terminated at will. Substitute rural carriers are not eligible for health insurance (section 521.2(b) attached as Appendix F-2), do not earn leave, as only full-time, part-time regular, and part-time flexible employees earn leave, as outlined in section 511.31 (copy attached as Appendix F-3) of the Employee and Labor Relations Manual. As noted in section 512.551 (attached as Appendix F-4), substitute rural carriers do not earn leave unless they are filling a vacant route or their carrier is sick. It is noteworthy that the substitute rural carrier, whose wages were used to reduce my backpay from the clerk job I accepted, was filling for a person who had a heart attack and was on extended sick leave. Therefore, that substitute rural carrier earned more

than other rural carrier substitutes since he was, in effect, a full time rural carrier. Section 512.553 (See Appendix F-4) states that when the regular rural carrier returns to work, the substitute is paid lump-sum for his accrued annual leave "if they have been in a leave earning capacity." This illustrates that the substitute rural carrier is only expected to work, as pointed out in the affidavit of Vance O. Lipe (See Appendix D), "on the regular carrier's off days and when the regular carrier is otherwise absent." As noted above, 561.2 (See Appendix F-7) denies civil service retirement to substitute rural carriers, and 531.3 (See Appendix F-5) excludes substitute rural carriers from life insurance coverage by the postal service.

On the other hand, a clerk/carrier enjoys a career appointment, and is entitled to all the benefits, such as life insurance, health insurance, civil service retirement, and sick and annual leave. A clerk/carrier cannot be terminated at will, but must be allowed to appeal any adverse determination through the postal service's Equal Employment Opportunity program. In addition, a clerk/carrier is not required to furnish his own vehicle, for the jeeps and trucks are furnished by the postal service. A clerk/carrier receives regular pay increases as authorized by 413.31 (See Appendix F-6), while the substitute rural carrier does not. The substitute rural carrier is not covered by the collective bargaining agreements, while the clerk/carrier represents the bulk of the employees

covered by such agreements within the postal service.

Thus, what appears to be two positions, similar in nature, in the postal service are really distinct in every respect. Therefore, under Ford, I was not obliged to accept a totally dissimilar position within the postal service any more than I would have been obliged to accept such a position without the postal service. What the district court and the appellate court overlooked was the fact that these jobs were dissimilar in every respect. Moreover, both courts ignored the fact that I accepted the original position applied for, the clerk/carrier position, as soon as it was offered, albeit without retroactive seniority or backpay.

It is important to recall that I applied for the clerk/carrier position in 1978, and accepted a job offer in 1983, even though backpay was not given until February of 1986. As seen above, the appellate court sanctioned me with double costs for asking for the backpay through 1985, the court below affirming the district court in cutting off backpay in 1983, the time the job was offered without retroactive seniority or backpay. I followed Ford to the letter, taking the job applied for, and continuing to battle in the courts for my backpay and seniority relief. At that time in 1983, I had moved back to Greenville, Mississippi, and was in a position to accept the job since I did not have to buy a car.

Both courts below stated that I have waived backpay from 1983-1985 when I had

requested backpay from the beginning of both lawsuits. Both courts also held that the substitute rural carrier's position, applied for in 1980 though it was totally dissimilar in pay and benefits because I needed any job, could be used to reduce my backpay from the clerk/carrier's position because I had failed to mitigate damages. The short answer to that is that no hearing was ever held to establish damages and mitigation or the lack thereof, and therefore the holding of the courts is without a basis in the record.

The correct answer, though, is that I mitigated damages by leaving town to look for work, I applied for every position available, including the substitute rural carrier's position, and I accepted the original job applied for as soon as it was offered. And the only

reason why I did not accept the substitute rural carrier's position, even though it left much to be desired in terms of the benefits available to a clerk/carrier, was that I was in another town and without money to purchase the car I needed in order to work. I do not see what more effort to mitigate was required of me. I ask this Supreme Court to issue the writ so that Ford might be reaffirmed or that the appellate court might be summarily reversed in view of Ford.

ARGUMENT NO. III

In View Of The Split Among The Circuits On Whether Interest Can Be Awarded On Backpay Awards Against The Postal Service, And Since The Congress, Given The Power To Establish Post Offices And

Post Roads In The Constitution, Has Given The Postal Service The Right To Sue And Be Sued In 39 U.S.C. 401 (1), Interest Should Be Allowed Against The Postal Service.

Generally, in employment discrimination cases, prejudgment and postjudgment interest is available, and only the immunity of the sovereign prevents it from being awarded against the government. The district court denied me interest, and either the appellate court affirmed sub silentio, as the district court later found, or the appellate court refused to address the issue. It is just unclear what the Fifth Circuit has done with respect to interest in this case.

The district court found that the issue had been fully briefed before the appellate court, and that its silence could only be sub silentio affirmation of its denial of interest to this pro se litigant. (See Appendix B for this February 25, 1986 order). Indeed, the Fifth Circuit's order of June 17, 1986, in which it sanctioned me specifically noted that I had waived certain issues and that others had been settled by a decision of that court, including "all the issues concerning the content of backpay, interest on the judgment..."

In a published opinion, issued May 9, 1986, five weeks before the Fifth Circuit wrote its opinion sanctioning me for continuing to raise settled issues such as interest on backpay, the Fifth Circuit wrote, in R & R Farm Enterprises, Inc. v. Federal Crop

Insurance Corporation, Department of Agriculture, 788 F.2d 1148 (5th Cir. 1986), that "this court has not yet addressed the issue" (of backpay interest against the postal service). (See Footnote 5). Interestingly, one judge cited by Justice Rehnquist in his confirmation hearings as preferring to hear a diversity case rather than a Title VII case, Judge Higginbotham, sat on both panels. Perhaps the fact that he was musing over the advantages of hearing a diversity case prevented him from seeing the inconsistency in having his name affixed to one opinion that said that the issue of interest on backpay against the postal service had not been raised in the Fifth Circuit, while his name was also affixed to an opinion sanctioning a pro se litigant for raising settled issues, such as

interest on backpay awards against the postal service. (See footnote 5 in R & R Farm Enterprises, supra).

Since the issue could not have been settled by a decision of the Fifth Circuit for R & R Enterprises stated that the issue of backpay interest against the postal service has not been raised in the Fifth Circuit, the other alternative in the June 17, 1986 order by the appellate court, that of waiver of interest, must be considered. However, I cannot have waived interest since the district court issued two opinions on the subject, and the statutory authority for interest precludes a waiver.

28 U.S.C. 1961 requires interest to be awarded on all civil judgments in a district court. The Fifth Circuit, in Reeves v. International Telephone and

Telegraph Corporation, 705 F.2d 750 (1983) and in Gele v. Wilson, 616 F.2d 146 (1980), has stated that all money judgments recovered in civil cases in federal district courts automatically bear interest from the date of entry. According to the Fifth Circuit's case law, then, interest on a federal district court civil judgment cannot be waived, but draws interest automatically. Since this is explicit statutory authority for postjudgment interest, it would appear that even the immunity of the sovereign would not protect the government from the reach of 28 U.S.C. 1961. The postal service has sought to invoke sovereign immunity, and the Fifth Circuit has held that it enjoys sovereign immunity in Prewitt v. United States Postal Service, 754 F.2d 641 (5th Cir. 1985). However, the

Fifth Circuit has also held that 39 U.S.C. 401(1), which authorized the postal service to sue and be sued, is an explicit waiver of sovereign immunity.

Indeed, the Supreme Court has held, in Franchise Tax Board v. United States Postal Service, 104 S.Ct. 2549 (1984) that section 39 U.S.C. 401(1) is a broad waiver of sovereign immunity and subjects the postal service to liability the same as any other business. In Library of Congress v. Shaw, 106 S.Ct. 2957 (1986), this court stated, in footnote 5, that the "no interest rule is similarly inapplicable where the government has cast off the cloak of sovereignty and assumed the status of a private commercial enterprise." In Franchise Tax Board, this court determined that Congress had intended to launch the postal service into the

commercial world. However, the Supreme Court has never ruled on the issue of interest awards on backpay against the postal service, and the circuit courts are split on this issue. The Fifth Circuit cannot determine if it has heard the issue of interest against the postal service, or whether the postal service has sovereign immunity, as we have seen. The writ should issue to resolve the split in the circuits, and the confusion in the Fifth Circuit.

The Eleventh Circuit, in Nagy v. United States Postal Service, 773 F.2d 1190, 1192-93 (1985), an opinion authored by a Fifth Circuit judge, Reynaldo Garza, allowed interest on backpay against the postal service, as did the Ninth Circuit in Hall v. Bolger, 768 F.2d 1148 (1985). However, the Eighth Circuit, in Cross v. United

States Postal Service, 733 F.2d 1327, 1329-30 (1984) has determined that interest is not available against the postal service. Now, the Fifth Circuit has either affirmed sub silentio the district court's denial of interest, treated it as having been waived, or never considered the issue at all, depending upon which decision of that court you read. At any rate, I am here before this court because the district court failed to allow me interest and the Fifth Circuit, for whatever reason, did not allow me interest, implicitly adding to the split in the circuits on this issue.

The Fifth Circuit has long allowed interest on backpay awards. Pettway v. American Cast Iron Pipe Co., 494 F.2d 211 (1974). Therefore, for interest to be denied, there must be a barrier, such

as sovereign immunity or a waiver. As noted above, 28 U.S.C. 1961 precludes a waiver, as interpreted by Fifth Circuit case law.

Moreover, the Constitution of the United States precludes any court from restoring sovereign immunity, by denial of interest, once it has been waived by the Congress. To do so would violate the Separation of Powers doctrine.

Article I, section 8 of the Constitution reserves to Congress the power to establish post roads and post offices. Since Congress has seen fit to explicitly waive sovereign immunity by means of a sue and be sued clause in 39 U.S.C. 401(1), as this Supreme Court has found in Franchise, supra, if interest is normally available in an employment discrimination case, it can only be denied as an appropriate exercise of the

discretion of the court so denying. It cannot be denied as barred by sovereign immunity since the Congress has waived it, and any restoration of sovereign immunity would violate the Constitution as invading the province of the Congress. Therefore, if interest would be awarded if the defendant were not the postal service, it must be awarded here since the bar of sovereign immunity is not available.

In sum, since 28 U.S.C. 1961 precludes a waiver of interest, since I did not waive interest as evidence by the district court's two opinions on the issue with one determining that the appellate court had sub silentio affirmed its denial of interest, since Article I section 8 and 39 U.S.C. 401(1) constitutes a broad waiver of sovereign immunity employing one of the enumerated

Powers of the Congress in the Constitution, and since this Supreme Court has found this broad waiver in Franchise, supra, it is plain that the Fifth Circuit committed error in denying me interest for either of its asserted reasons. Since the Circuit Courts are split on this issue, the writ should issue to resolve this question.

ARGUMENT NO. IV

Costs, Retroactive Sick And Annual Leave, Along With Other Benefits, Cannot Be Denied A Pro Se Litigant Simply Because He Exercises His First Amendment Right To Say That Some Members Of The Judiciary And The Staffs Therein Are Racist In Their Dispositions.

Costs, sick and annual leave, the customarily awarded a prevailing litigant as part of the remedial relief. 29 U.S. C. 794(a) specifically authorizes costs to the prevailing plaintiff as does Title VII jurisprudence generally. In this case, not only have I been denied costs, but the other party which discriminated against me, has been allowed over $56.00 in costs. (See Appendix E for sanctions). It is not clear what rule or case law authorizes such punitive abuse of discretion since none was cited in the Fifth Circuit to deny me costs, interest, backpay, sick and annual leave and other appropriate relief.

Normally, in this country, protected speech is not subject to restriction, except under the most exigent of circumstances or by the time, place, and

manner restrictions now applicable to the same secondary effects of protected speech. Unprotected speech such as obscenity or child pornography is subject to a total ban. However, unless it is now considered obscene to speak out where there is a perception of discrimination as to race, even and especially where the perception emanates from a court of law, I cannot be sanctioned for saying what is constitutionally protected. (See generally, Appendix A).

The Fifth Circuit found my words "rancorous" and "vituperative", which, as far as I can tell, is not sufficient justification for violating my First Amendment right to say that racism exists within the judicial system of the United States, and that a white female law clerk is more inclined to listen to

what a white male attorney has to say than she is to a black pro se litigant. The marriage records of this country, along with the history of the Dred Scott decision by the Supreme Court, lends credence to my words.

What occurred in the courts below occurred because there was no hearing on damages or mitigation. The postal service's attorney would call up the white female law clerk of the district court and tell her what he was going to do, and they would dispose of the case in this summary, ex parte fashion. I objected to this practice, and I still object. For that objection, I was sanctioned, for the Fifth Circuit quotes my very objection as evidence that I deserved to be sanctioned.

The appellate court found my motions "ridiculous and frivolous", (See

Appendix A), as I attempted to obtain relief for the discrimination I had suffered. I am not an attorney, and I have no doubt that many of my motions were ridiculous to a learned district court judge or to a learned panel of Circuit judges who have years of training and practice from which to view my pro se efforts. However, the fact remains that I prevailed, guided by God Almighty, by proving discrimination in the courtroom, where discovery had been denied me. Rather than take a chance that I might be able to prove my damages if a hearing were held, the courts below dispensed with such a hearing, dispensed with my attempts at discovery, and accepted what a white male attorney was telling a white female law clerk.

Now, I would prefer to believe that all white people are pure as the driven

snow, but history and personal experience has taught me otherwise. I do not rely upon what any person tells me where the law is concerned, for I have found that courts deal in a most mysterious fashion. However, Oliver Wendell Holmes thought that the law should be based upon the "bad man theory" of justice. That is, all notions of morality should be excised and the law should be viewed from a perspective unfettered by notions of what is morally right or wrong.

It is clear that the judges from the Fifth Circuit who sanctioned me are not adherents to Holmes' legal philosophy. They sanctioned me on the basis of what they felt was morally outrageous, but still protected speech since it was not outside the bounds of legality. They looked at how my motions were structured

and not at the basis of that structuring.

The Fifth Circuit noted that "the two issues which had been remanded to the district court were properly subject to appeal by Mr. Prewitt." Having said that the appeal was proper, the panel then proceeded to find part of it frivolous, which is akin to finding a posthumous child to be an illegitimate child because of the time of its birth and not the circumstances of its birth. That is to say, if one's viewpoint is clouded by morality, a correct enunciation of the law is impossible.

What I think or say or write about the judicial system is irrelevant as long as my language is merely "rancorous" or "vituperative", for the First Amendment allows me to scold our system of government and the officials

within it because such dialogue goes to the heart of our system. What is relevant is only the legal issues presented to a court, and unless these issues are determined without regard to who is saying what, our judicial system becomes a cacophony of splintered decisions covering the spectrum, not of law, but or morality.

CONCLUSION

I am only a pro se litigant who prevailed, with the guidance of Almighty God. My language, as long as it is protected speech, is not to be the basis of a general denial of relief, such as costs, backpay, interest, sick and annual leave and other appropriate relief. If the Fifth Circuit's opinions regarding me are closely examined, one glaring fact stands out. When they are punitive, they cite no cases in support

of their positions. They are thus citing their morality, and that is an intolerable flaw.

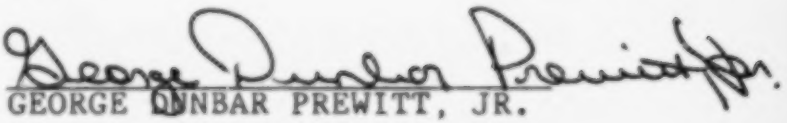
I ask, for the foregoing reasons, the write to issue to the Fifth Circuit.

GEORGE DUNBAR PREWITT, JR.
PRO SE
P.O. Box 1728
Oxford, MS 38655

CERTIFICATE OF SERVICE

I do hereby certify that three true and correct copies of the foregoing instrument have been served on Honorable Charles Fried, Solicitor General, Department of Justice, Tenth and Constitution Avenue, Washington, D.C. 20503 and three true and correct copies to Mr. Kevin Rachel, Postal Service Attorney at 475 L'Enfant Plaza, Washington, D.C. 20260 by United States

Mail, postage prepaid on the 12th day of September, 1986.



GEORGE DUNBAR PREWITT, JR.

A P P E N D I X

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 86-4092

Summary Calendar

G. DUNBAR PREWITT, JR.,
Individually and on behalf
of all others similarly situated,

Plantiff-Appellant,

versus

UNITED STATES POSTAL SERVICE,

Defendant-Appellee.

Appeal from the United States District Court for the Northern District of Mississippi

---

(June 17, 1986)

Before CLARK, Chief Judge, WILLIAMS and Higginbotham, Circuit Judges.

APPENDIX "A"

PER CURIAM.*

---

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Once again this case comes before us. This time appellant, George Dunbar Prewitt, Jr., is challenging the decision of the district court in following the mandate of our June 26, 1985, decision. We find the decision of the district court well within the discretion under our mandate, and we affirm.

Appellant Prewitt, a disabled veteran, was denied employment with the Postal Service on the ground that he was physically incapable of fulfilling the demands of the position for which he applied. He succeeded in getting this decision reversed in appeals to this Court. We do not go into the substantive details. They are described thoroughly in Prewitt v. United States Postal Service, 622 F.2d 292 (5th Cir. 1981), and Prewitt v. United States

Postal Service, 662 F.2d 311 (5th Cir. 1981).

After the district court awarded him assignment to his desired position together with backpay and retroactive seniority, he appealed the refusal to award him tens of millions of dollars in punitive damages as well as attorney's fees even though at all times he had acted pro se. This Court denied this appeal in Prewitt v. United States Postal Service, 754 F.2d 641 (5th Cir. 1985), and concluded its opinion with the following admonition:

> The real controversy has ended, with Mr. Prewitt having prevailed and received appropriate relief. Further frivolous demands of the sort presented here may subject Mr. Prewitt, even as a pro se litigant, to sanctions for vexatious multiplication of litigation. See Lewis v. Brown & Root, Inc., 711 F.2d 1287 (5th Cir. 1983).

The district court then proceeded to set the date at which to begin the backpay period, and it refused to deduct from the gross backpay award an amount which Mr. Prewitt would have earned if he had accepted a substitute rural carrier position when it was offered to him. The United States Postal Service appealed that decision of the district court and prevailed in Prewitt v. United States Postal Service, No. 85-4006 (5th Cir. June 20, 1985). The opinion is unpublished.

On remand from that appeal, the district court established April 7, 1979, as the proper date for beginning the backpay period. The court found, in accordance with our mandate, that that was the date "when Prewitt's employment would have begun but for the unlawful discrimination." The district court

also made necessary findings and reduced Prewitt's backpay award to the extent that the rural carrier position would have mitigated his damages. That sum in mitigation was $16,109.85.

On this appeal, review of the district court's decision as to the date for calculating the backpay award is properly before us as is the dollar amount of mitigation of damages based upon the refusal of appellant to accept the substitute rural carrier position when it was offered to him.

But in addition to these two matters, appellant, acting pro se, has again raised a number of procedural and substantive issues which he has raised in the past. Without making an exhaustive list, these issues include payment of interest on the judgment, inclusion in the backpay award of

retroactive annual leave, sick leave and all other benefits, and the inclusion of tax component in the award.

We dispose of these last itemized matters first. All the issues concerning the content of backpay, interest on the judgment, the frivolous claim on tax component, either have been raised before and settled by a decision of this Court, or waived for failure to raise before the district court.

What appellant has not accepted in this appeal is that our mandate in the June 26, 1985, case was exceedingly limited in scope and was quite clear. The district court had the power on remand only to establish the date at which the backpay award would begin, and to establish the dollar amount in mitigation of the backpay award because of appellant's refusal to accept the

alternative employment. All issues raised by appellant in that earlier appeal were settled by the decision of this Court.

The issue as to the date which the district court established for the back-pay award to begin, April 7, 1979, complies with the mandate of this court that the district court establish "the date when Prewitt' employment would have begun but for the unlawful discrimination." The facts show that Mr. Prewitt was placed upon a hiring register on September 14, 1978, but no one on that register filled any vacancy until April 7, 1979. While it was established that there was discrimination against Mr. Prewitt on February 2, 1979, when Mr. Prewitt's name was taken off the register, it was not until the first vacancy was filled

on April 7, 1979, that Mr. Prewitt incurred damage. The court found that there was no opportunity for Mr. Prewitt to have been hired until that date even if his name had not taken from the register.

The decision of the district court on this issue seems to be a reasonable factual conclusion based upon the evidence, and we uphold it.

Determining the amount in mitigation because of the refusal of appellant to accept the substitute rural carrier position also is a matter of discretion based upon the evidence in the district court. An exactly accurate sum was impossible to achieve. The sum had to be speculatively projected from differing work loads on different rural routes and the fact that different rural carriers earn different amounts. The

district court accepted as the best evidence comparable earnings of the most junior rural carrier who had also actually occupied the rural carrier position that appellant would have filled. This amount was then reduced by a one step increase in pay because Mr. Prewitt would have begun at the lower level. This decision by the district court is reasonable and properly based upon the evidence before it.

Appellant also makes general claims of unfair procedures as to discovery and the evidence the court credited in reaching these two decisions. We find no support for these procedural claims in the record.

The government has asked for sanctions against appellant on the ground that this is a frivolous appeal. Mr. Prewitt's actions throughout this case

have been characterized by the filing of ridiculous and frivolous claims and motions which the government has had to counter. We do find, however, that the narrow appeal on the two issues which had been remanded to the district court were properly subject to appeal by Mr. Prewitt. Thus no sanction is justified on this basis. In addition, however, the rest of Mr. Prewitt's appeal is frivolous. The raising of claims not properly before this Court on appeal and clearly disposed of at an earlier time, and additional claims which will be mentioned in the next paragraph, caused the government additional time and energy in replying to this appeal. While the government has asked for the sanction of attorney's fees against appellant, it has not made claim for any set amount. Further, such a sanction

would be a heavy burden upon a pro se litigant who did prevail earlier on his basic claim. In our decision in 754 F.2d 641, however, Mr. Prewitt was adequately warned about continuing to pursue settled and frivolous claims. His persistence in doing so on this appeal justifies the awarding of the sanction of double costs under Fed. R. App. P. 38.

Throughout this case, the record reveals that Mr. Prewitt has cast personal aspersions upon government officials involved and upon the district courts and districts judges who have handled his case. There is not the slightest support in the record for these aspersions.

Even in this brief on this appeal, Mr. Prewitt starts off his argument by

indicating that the district court has accepted anything that the government offered "whether in the form of ex parte conversations by the defendants' white and male attorney with the district court's white female law clerk..." and by saying "I do not dare intimate anything other than the fact that the people of the same race and different sex are often, shall we say, receptive to certain arguments presented in a cogent fashion by a skillful counselor..." In his denial, he obviously is actual intimating something other than the fact that skilled presentation of the case was involved. Then, he went on to say that the law controlling this case "is startling clear so that the court below could not have simply overlooked it. There must have been some other factor to cloud the

powers of discernment of the court below."

Later in the brief he referred to the action of the district court as "mind-boggling" and as "circular boot-strapping by a federal judge [which] is simply incredible." This kind of personal vituperative attack shows a lack of respect for the courts and legal processes and was without the slightest support in the record. This attack would, if this brief had been written by a member of the bar, constitute grounds for striking the brief as well as for possible personal sanctions against the attorney. But because this litigant is pro se and had a genuine grievance in the suit which he brought, we have been tolerant of his rancorous language about the legal Processes and those involved in it.

This case should now be over. If the appellant undertakes further court action under additional claims growing out of the same factual situation, he must be warned that sanctions for frivolous actions can lead to substantial money judgments for damages as a sanction under Rule 38, and vituperative statements impugning the motives of the courts and judicial procedures can generate sanctions as well.

AFFIRMED, DOUBLE COSTS ASSESSED AGAINST APPELLANT.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI

GEORGE DUNBAR PREWITT, JR. PLANTIFF

VS. CIVIL ACTION NO. 80-28

UNITED STATES POSTAL SERVICE DEFENDANT

ORDER

This matter is before the Court on Plantiffs' Motion for Fees, Expenses and Costs and for relief from judgment under Rule 60 (b) (6), F.R. Civ. P.

Without retracing the entire tortuous course of this protracted litigation, the Court notes that the Judgment which gave rise to the instant motions was entered by this Court on December 16, 1985, in accordance with the Fifth Circuit's Order reversing the prior Judgment of this Court and remanding the case for further consideration. Prewitt v. United States Postal Service, No. 85-4006 (unpublished opinion, 5th Cir.

June 26, 1985). In accordance with that Order, this Court on remand reduced Plantiff's award of backpay and retroactive seniority to reflect an abbreviated back period and Plantiff's failure to mitigate his damages. Prewitt v. United States Postal Service, Civil Action No. 80-28 (N.D. Miss., Dec. 16, 1985). The result of this Court's proceeding on remand was that Plantiff's backpay award was reduced by approximately $28,000.

MOTION FOR FEES, EXPENSES AND COSTS

Mr. Prewitt seeks an award in excess of $200,000.00 for "agents fees," expenses and costs incurred in prosecution of his claim against the Postal Service. As noted by the Postal Service, the pro se Plantiff has sought similar relief in numerous motions during the course of this litigation. On appeal from an earlier denial of such relief, the Court of Appeals for the Fifth Circuit stated as follows:

> A careful examination of the briefs and record in this appeal convinces us that the appellant Prewitt has received at the hands of the trial court all the relief to which he is properly entitled: backpay, retroative seniority and assignment to the desired position. With his presently appealed claims to tens of millions of dollars in punitive damages against

> Defendants enjoying immunity to such claims, to attorney fees when he at all times acted pro se, and the like, we stand at the gate of the realms of fantasy. We decline to enter in.

Prewitt v. United States Postal Service, 754 F.2d 64 (5th Cir. 1985).

The Motion now before this court for fees, costs and expenses is clearly an attempt to circumvent earlier rulings of this Court and the Court of Appeals. In addition, Plantiff was not the prevailing party on remand and would thus in any case not be entitled to the relief requested.

MOTION FOR RELIEF FROM JUDGMENT

Plantiff has also moved pursuant to Rule 60(b) (6) for relief from the judgment entered herein on December 16, 1985. Specifically, Plantiff has asked this Court to correct that judgment by

adding an award of pre- and post-judgment interest. In support of his motion, Plantiff has alleged that this Court's failure to award interest was unconstitutional. Without ruling on the merits of Plantiff's claim, this Court notes that Rule 60 (b) is not the appropriate avenue for the relief requested by Plantiff. As noted in United States v. 329.73 Acres of Land, 695 F.2d 922 (5th Cir. 1983), an alleged mistake of law should be raised on appeal from judgment or by motion to amend under Rule 59 (e).

Even without the procedural bar, Plantiff cannot prevail on his claim for interest since it has already been determined in this case that he is not entitled to such relief. Mr. Prewitt first requested interest on his backpay award the previous time that this case

was before this Court. In an Order dated October 29, 1984, this Court held that Mr. Prewitt was not entitled to any interest. Prewitt v. United States Postal Service, Civil Action No. GC-80-28, Order Establishing Backpay Amount and Seniority Level (N.D. Miss. Oct. 29, 1984). On appeal from that Order Mr. Prewitt brought this issue before the United States Court of Appeals for the Fifth Circuit and the issue was fully briefed on appeal. While the Fifth Circuit did not address this issue in its decision on appeal, Prewitt v. United States Postal Service, No. 85-4006 (5th Cir. June 26, 1985), the Court's silence on this issue and the limited scope of the remand order can only be interpreted as a sub silentio affirmance of this Court's decision denying interest.

In accordance with the above, Plantiff's Motions for fees, costs and expenses and relief from judgment are denied.

ORDERED this the 25th day of February, 1986.

William H. Barbour Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

GEORGE DUNBAR PREWITT PLANTIFF

VS. CIVIL ACTION NO. 80-28

U.S. POSTAL SERVICE DEFENDANT

ORDER

This Court has before it several documents from the pro se Plantiff herein requesting various forms of relief with respect to the resolution of this action on remand from the United States Court of Appeals for the Fifth Circuit. Reading the letters and pleadings of the pro se Plantiff liberally, this Court concludes that there are four unresolved motions currently pending. These motions are: 1) Motion for order directing the Postal Service to pay Plantiff the difference in Step 1 and Step 6 pay rates from

February 1983 to February 1985. 2) Motion for order directing the Postal Service to list the exact amount of money that would have been earned by Plantiff in each year of the backpay period or, in the alternative, to allow Plantiff as part of the costs of this action, accountants' fees to ascertain the amount of taxes owed with respect to the backpay award. 3) Motion for partial summary judgment awarding Plantiff $65,000.00. 4) Motion for recusal.

MOTION FOR BACKPAY FROM FEBRUARY 1983 TO FEBRUARY 1985.

Plantiff has asserted that he is entitled to backpay from February 1983, the date he was hired by the Postal Service, to February 1985, in an amount equal to the difference in the rate at which he was paid and the Step 6 rate at

which he claims he should have paid. This issue was not raised before this Court in the prior determination of backpay damages and it was not raised on the appeal of that determination. This action is currently before this Court on remand from the Fifth Circuit. Prewitt v. United States Postal Service, slip op. App. No. 84-4006 (5th Cir. June 26, 1985). Both the appeal and the Order remanding this action were based upon this Court's Order awarding Plantiff backpay damages for a period beginning in September 1978 and ending February 1983. That Order was entered by this Court in October, 1984. No issue was raised by Plantiff at that time concerning his rate of pay after February 1983 and no such issue was raised before the Court of Appeals. Plantiff has therefore waived the right

to now assert that he is entitled to backpay damages after February, 1983, and that issue will not be considered in connection with this action on remand.

MOTION FOR ACCOUNTANTS' FEES

Plantiff has also requested that this Court either order the Postal Service to specify the amount of the backpay award that would have been earned by Plantiff in each of the years covered by the backpay period or award him the expenses of consulting an accountant to help him prepare the tax returns after he received the backpay award. Plantiff has provided no authority to support his entitlement to this highly unusual form of relief and this Court has been unable to find any such authority. In addition, Plantiff is again raising an issue with regard to the backpay award which was not raised

before this Court or before the Court of Appeals in the prior determination of backpay damages. This relief is therefore denied.

MOTION FOR PARTIAL SUMMARY JUDGMENT

The Postal Service filed a Motion for Summary Judgment in this matter following the remand from the Court of Appeals. That motion was denied by this Court in an Order entered on October 9, 1985. In that Motion, the Postal Service requested that this court enter final judgment in favor of Plantiff for backpay in an amount of $65,656.52. Prewitt has now requested that this Court enter partial summary judgment in his favor for this amount, leaving him free to pursue his claim as to any additional amounts. Such relief is clearly not warranted. Plantiff has disputed numerous material issues of

fact with regard to the Postal Service's Motion for Summary Judgment and these disputes relate to the entire backpay award. Since there are material issues of disputed fact with regard to the award, Plantiff's Motion for Partial Summary Judgment is denied.

RECUSAL

Plantiff has requested for the second time in the course of this litigation that this judge recuse himself. As noted in this Court's response to Plantiff's first motion for recusal, two judges from the Northern District of Mississippi have already recused themselves from this action at Plantiff's request. Motions for recusal have also been filed by Plantiff with respect to most of the judges on the Fifth Circuit Court of Appeals. The Motion for Recusal now before this Court

is based upon Plantiff's distrust of the law clerk who has worked on this case. This is not, in this Judge's opinion, sufficient grounds for recusal since the decision in this case will be made by the Judge and not by the law clerk. The Court therefore finds that the Motion for Recusal is without merit and should be denied.

ORDERED this the 17th day of December, 1985.

William H. Barbour Jr.
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF MISSISSIPPI
GREENVILLE DIVISION

GEORGE DUNBAR PREWITT, JR. Plantiff,	)	
v.	)	C.A. No. 80-28
UNITED STATES POSTAL SERVICE Defendant	)	

SECOND SUPPLEMENTAL AFFIDAVIT

OF VANCE O. LIPE

I, Vance O. Lipe, being first dully sworn, depose and state:

1. When a substitute rural letter carrier is hired, he or she is assigned to a particular rural route. Substitute rural carriers work on the regular carrier's off-days and when the regular carrier is otherwise absent. The number of hours that the substitute carrier works, therefore, is determined by the availability of the regular carrier on

the route to which the substitute carrier has been assigned. Seniority plays no factor in determining the hours that a substitute rural carrier works.

2. In June 1982 Mr. H.C. Tucker received, due to his seniority, a step increase in salary which Mr. Prewitt would not have received had he begun working for the Postal Service in May 1982. The increase was from $8.77 an hour to $9.03 an hour...

323.2 Career Accessions

.21 Career Appointment

.211 Authority

Career appointments are made under authority of Title 39 USC (Postal Reorganization Act) Section 1001, dated Aug. 12, 1970.

.212 Definition

A career appointment is an appointment to the Postal Carrier Service without time limitation. Included are:

a. Full-Time Employees, Part- Time Regular Employees and Part-Time Flexible Employees.

b. Exempt, Non-Exempt, and Part-Time Salaried Employees.

Excluded are:

a. Casual and Temporary Employees.

b. Substitute Rural Carriers.

c. Auxiliary Rural Carriers.

521.1 Employees Not Eligible. The following employees, with certain exceptions, are not eligible for health insurance.

a. Casual and temporary employees (including "off-the-street" Officers-in-Charge) serving under an appointment limited to 1 year or less, except as eligible under 521.1. When individuals are hired as casual or temporary employees and they have previously served in a position in the USPS or another federal government agency wherein they were covered by the Health Benefits Program, there must be a break of at least 4 days between such service and the casual or temporary appointment.

b. Substitute rural carriers except those transferred from positions in which they were insured without a break in service of more than 3 calendar days.

511.3 Eligibility

.31 Employees covered by the leave program are:

a. Full-time employees.

b. Part-time regular employees.

c. Part-time flexible employees.

.55 Substitute Rural Carriers

.551 General. A substitute rural carrier either serves as a leave replacement for a regular rural carrier or serves as a vacant rural route.

Note:

a. Leave replacements do not earn annual (or sick) leave.

.531.2 Eligible Employees. All postal employees, except those specifically excluded in 531.3, or those who waive coverage, receive regular group life insurance coverage and are generally eligible for the $10,000 optional life insurance coverage.

531.3 Exclusions

Excluded Individuals

Substitute Rural Carriers

413.3 Step Increases

.31 Eligibility Requirements. Eligibility for a periodic step increase (excluding a quality step increase) is based on four conditions. An employee must have:

a. Received an appointment that is not "time limited".

561.2 Exclusions

The Civil Service Retirement Law does not apply to:

a. Casual employees, except as provided in 561.1c.

b. Employees serving under appointments limited to 1 year or less. (If individuals have previously served in positions in the USPS or other Federal Government agencies where they were covered by the Retirement Program, there, must be a break of at least 4 days between such previous service and the casual or temporary appointment in the USPS.)

c. Employees serving under temporary appointment pending establishment of a regular or pending final determination of eligibility for permanent appointment.

d. Employees paid on a contract or a few basis such as mail messengers, star route contractors, and clerks in charge of contract stations.

e. Officers-in-charge, unless they are covered in a position specified in 561.1

f. Clerks in post offices in Cost Ascertainment Group (CAG) L and special delivery messengers who are in post offices in CAG H,J,K, and L.

g. Substitute rural carriers, unless they fall under the exception specified in 561.1c.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8

The Congress shall have power... to establish post offices and post roads.

28 U.S.C. § 1961

Interest shall be allowed on any money judgment in a civil case recovered in a district court. Executive therefore may be levied by the marshall, in any case, where, by the law of the State in which such court is held, execution may be levied for interest on judgments recovered in the courts of the State. Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the coupon issue yield equivalent (as determined by the Secretary of the Treasury) of the average accepted auction price for the last auctio [sic] of the fifty-two week United States Treasury bills settled immediately prior to the date of the judgment. The Director of the Administrative Office of the United States Courts shall

distribute notice of that rate and any changes in it to all Federal judges.

29 U.S.C. § 794(a)

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e-16 [42USCS § 2000e-161], including the application of sections 706(f) through (k) [42 USCS § 2000e -5(f)-(k)], shall be available, with respect to any complaint under section 501 of this Act [29 USCS § 791], to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefore or other appropriate relief in

order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 USC §§ 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act [29 USCS §§794].

(b) In any action or proceeding to enforce or charge a violation of a provision of this title [29 USC §§ 790 et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

39 U.S.C. §401(1)

The postal service shall have the following powers:

(1) to sue and be sued in its own name.

Supreme Court, U.S.
FILED
MAR 9 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-898 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1986

GEORGE DUNBAR PREWITT, JR., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

CHARLES FRIED
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CORRECTED COPY

9/84

TABLE OF AUTHORITIES

	Page
Cases:	
American President Lines, In re, 804 F.2d 1307 (D.C. Cir. 1986)	5
Hall v. *Bolger,* 768 F.2d 1148 (9th Cir. 1985)	4
Harrison v. *Commissioner,* 805 F.2d 973 (11th Cir. 1986)	5
Loeffler v. *Tisch,* 806 F.2d 817 (8th Cir. 1986)	4
Nagy v. *United States Postal Service,* 773 F.2d 1190 (11th Cir. 1985)	4
Prewitt v. *United States Postal Service*:	
662 F.2d 292 (5th Cir. 1981)	1
662 F.2d 311 (5th Cir. 1981)	2
754 F.2d 641 (5th Cir. 1985)	2
No. 85-4006 (5th Cir. June 26, 1985)	2
No. 85-5150 (Oct. 7, 1985)	5
Scarpa v. *Murphy,* 806 F.2d 326 (1st Cir. 1986)	5
Stafford v. *Commissioner,* 805 F.2d 895 (10th Cir. 1986)	5
225 Broadway Co. v. *Sheridan,* 807 F.2d 24 (2d Cir. 1986)	5
Statutes:	
Civil Rights Act of 1964, Tit. VII, 42 U.S.C. 2000e *et seq.*	4
Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*	1
Fed. R. App. P. 38	1, 5
Fed. R. Civ. P.:	
Rule 43(e)	4
Rule 60(b)(6)	2

In the Supreme Court of the United States

OCTOBER TERM, 1986

No. 86-898

GEORGE DUNBAR PREWITT, JR., PETITIONER

v.

UNITED STATES POSTAL SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

In 1981 petitioner successfully sued respondent for handicap discrimination in violation of the Rehabilitation Act. Petitioner now contends that the court of appeals erred in refusing to award him additional back pay, as well as costs and interest. He also contends that the court of appeals erroneously sanctioned him under Fed. R. App. P. 38.

1. Petitioner is a disabled veteran. In 1981, after respondent denied his application for employment as a clerk/carrier at the Greenville, Mississippi post office, petitioner brought an action charging respondent with handicap discrimination, in violation of the Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.* The district court granted respondent's motion for summary judgment. The court of appeals reversed, ordering further proceedings on the merits of petitioner's claim. See *Prewitt* v. *United States Postal Service,* 662 F.2d 292 (1981) (*Prewitt I*).[1]

[1] Petitioner also brought a parallel action against respondent. In it, he alleged that respondent had engaged in handicap discrimination when it denied his application for employment as a substitute rural carrier at the Greenville, Mississippi post office. The district court

The district court on remand upheld petitioner's discrimination claim. It awarded him backpay and assigned him to his desired position with retroactive seniority, but rejected his claim for interest on his backpay award (Pet. App. A4, A20-A21). Petitioner appealed and respondent cross-appealed. The court of appeals, in an unpublished opinion (*Prewitt* v. *United States Postal Service*, No. 85-4006 (June 26, 1985) (*Prewitt III*)), affirmed the district court's decision on all issues raised by petitioner. On respondent's cross-appeal, however, the court set aside the district court's backpay calculations. At approximately the same time, in a related appeal pressed by petitioner, the court of appeals concluded that petitioner had "received at the hands of the trial court all the relief to which he [was] properly entitled" (*Prewitt* v. *United States Postal Service*, 754 F.2d 641, 641 (1985) (*Prewitt IV*)). The court found that petitioner's additional claims "st[ood] at the gate of the realm of fantasy." And it held that "[f]urther frivolous demands * * * may subject [petitioner], even as a *pro se* litigant, to sanctions for vexatious multiplication of litigation." *Ibid.*

2. On remand from the court of appeals' decision in *Prewitt III*, the district court in the instant phase of the litigation reconsidered the time period for which petitioner would receive backpay and recalculated the amount of the award (Pet. App. A5-A6). Petitioner moved for relief from judgment under Fed. R. Civ. P. 60(b)(6), and the district court denied relief (Pet. App. A16-A22). The court rejected petitioner's demand for $200,000 in "agent's fees," characterizing that claim as "an attempt to circumvent earlier rulings of this Court and the Court of Appeals" de-

---

dismissed that complaint; the court of appeals vacated and remanded with directions that the case be stayed until petitioner had exhausted his administrative remedies. See *Prewitt* v. *United States Postal Service*, 662 F.2d 311 (5th Cir. 1981) (*Prewitt II*). The instant petition does not address the merits of that action.

nying similar requests (*id.* at A18-A19). The court also rejected petitioner's claim for pre- and post-judgment interest, noting that that claim had "already been determined in this case" (*id.* at A20).

3. The court of appeals, in an unpublished opinion, unanimously affirmed (Pet. App. A1-A15). It agreed with the district court (*id.* at A6-A8) that petitioner was neither entitled to renew his claim for interest on the judgment nor entitled to demand that his backpay award include retroactive annual leave, sick leave and other benefits. Each of these claims, the court observed (*id.* at A7), "either ha[d] been raised before and settled by a decision of this Court, or [had been] waived for failure to raise before the district court." The court then upheld (*id.* at A9-A10) the district court's backpay calculations, which were the subject of the remand in *Prewitt III*.

Finally, the court of appeals assessed double costs as sanctions against petitioner (Pet. App. A10-A15). The court found (*id.* at A10-A11) that petitioner's "actions throughout this case have been characterized by the filing of ridiculous and frivolous claims and motions which the government has had to counter." The court acknowledged that petitioner's "narrow appeal on the two issues which had been remanded to the district court were properly subject to appeal" at this stage of the litigation (*id.* at A11). But the court determined that the balance of the appeal was frivolous, in that petitioner had raised the same claims at earlier stages of the litigation (*ibid.*). Noting that petitioner had been cautioned before about his persistent, frivolous motions, the court concluded that under Fed. R. App. P. 38 the sanction of double costs was appropriate (Pet. App. A12).[2]

---

[2] The court also noted that throughout the litigation petitioner had "cast personal aspersions upon government officials involved and upon the district courts and district judges" for which there was "not the slightest support in the record" (Pet. App. A12).

4. Petitioner first contends (Pet. 9-11) that he should be granted additional backpay for the period between 1983 and 1985. The district court, in a prior order of December 1985 (Pet. App. A23-A29), held that petitioner had waived this claim by failing to raise it in the proceeding to determine the scope of the backpay award (*id.* at A24-A26). Petitioner concedes (Pet. 10) that he neglected to raise the issue at the appropriate time but he asks this Court to excuse his neglect. There is no reason to do so.

5. Petitioner next asserts (Pet. 12-24) that he was entitled to a plenary hearing on remand from *Prewitt III* to determine the amount of the backpay award, and that the district court erred in resolving that issue on the basis of affidavits. The court of appeals could find "no support for th[at] procedural claim[]" (Pet. App. A10), and petitioner does not offer any. Indeed, Fed. R. Civ. P. 43(e) expressly provides that "[w]hen a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties." Petitioner does not explain why that rule should not be applied to him.

6. Petitioner also asks the Court to resolve a conflict in the circuits on the liability of the Postal Service for interest on certain backpay awards. There is, to be sure, disagreement among the circuits on whether interest is available against the Postal Service on backpay awards under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*[3] But in this case the court of appeals, in its unpublished opinion, explicitly refused to reach that issue.

---

[3] Compare *Nagy* v. *United States Postal Service*, 773 F.2d 1190, 1192-1193 (11th Cir. 1985) (Postal Service is liable for interest on backpay award under Title VII), with *Loeffler* v. *Tisch*, 806 F.2d 817, 818 (8th Cir. 1986) (sovereign immunity bars an award of prejudgment interest on Title VII backpay award). See also *Hall* v. *Bolger*, 768 F.2d 1148, 1151-1152 (9th Cir. 1985) (postjudgment interest is available on award of attorney fees against the Postal Service).

The court held that it had rejected petitioner's claim for interest in a prior appeal (Pet. App. A7-A8). There, too, the court rejected petitioner's claim without expressly discussing its merits. Because the court of appeals has thus not in terms addressed the merits of petitioner's interest claim, this case is an inappropriate vehicle in which to resolve the conflict among other circuits on the issue.[4]

7. Finally, petitioner challenges (Pet. 35-42) the court of appeals' refusal to grant him additional backpay and its decision to sanction him with double costs. Petitioner asserts that in making these rulings the court penalized him for his "exercise[] [of] his first amendment right to say that some members of the judiciary and the staffs therein are racist in their dispositions" (Pet. 35). That assertion is frivolous. The court of appeals did not reject petitioner's claim for additional backpay because of his intemperate outbursts; it rejected that claim because it was untimely (see Pet. App. A7). And the court acted well within its discretion in imposing sanctions under Fed. R. App. P. 38. See *225 Broadway Co.* v. *Sheridan*, 807 F.2d 24, 26 (2d Cir. 1986); *Scarpa* v. *Murphy*, 806 F.2d 326, 329 (1st Cir. 1986); *Harrison* v. *Commissioner*, 805 F.2d 973, 974 (11th Cir. 1986); *Stafford* v. *Commissioner*, 805 F.2d 895, 896 (10th Cir. 1986); *In re American President Lines*, 804 F.2d 1307, 1310 (D.C. Cir. 1986).

---

[4] Petitioner raised an identical claim for interest in an earlier petition to this Court. In *Prewitt* v. *United States Postal Service*, No. 85-5150 (Oct. 7, 1985), petitioner sought review of the court of appeals' decision in *Prewitt IV*. Petitioner also moved for leave to proceed in forma pauperis. This Court denied the motion and granted petitioner additional time within which to pay the required docketing fee and submit a petition in compliance with the Court's rules. Petitioner apparently did not file a new petition.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

MARCH 1987

U.S. GOVERNMENT PRINTING OFFICE: 1987—181-483/40244